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07-1568

In The
SUPREME COURT OF THE UNITED STATES

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NEW YORK,

Petitioner,

-versus-

AZIM HALL,

Respondent.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

The State of New York submits this reply brief in support of its petition for a writ of *certiorari*.

## ARGUMENT

In a single uninterrupted search, the police brought respondent to the police precinct where they conducted a strip and visual body cavity search of his person. Upon spying a string dangling from his rectum, the police pulled the string, thereby recovering the crack cocaine respondent had stored inside of himself. From this one search, two compelling Fourth Amendment issues worthy of this Court's review are presented. First, whether the police can lawfully conduct warrantless strip and visual body cavity searches incident to arrest, for the purpose of finding and preserving concealed evidence

of the crime, and second, whether by subsequently pulling on a string protruding from respondent's rectum, the police conducted an intrusion into the body requiring a warrant under *Schmerber v. California*, 384 U.S. 757 (1966).

In his brief opposing *certiorari*, respondent does not deny that both issues present a federal question, nor does respondent argue that there are any factual disputes warranting the denial of this petition. Rather, with regards to whether the police lawfully conducted a strip and visual body cavity search incident to arrest, respondent asserts that this case is not the "proper vehicle" for this Court to settle the matter because petitioner (the State) "won on that issue below." Further, while respondent acknowledges that the courts below are divided over this important issue, he attempts to downplay the extent of that conflict. With regard to whether the police lawfully pulled the string that they discovered during the visual body cavity search, respondent contends that there is "no conflict in the law for this Court to resolve" (Opposition Brief: 12-14), and he also argues that the New York Court of Appeals' decision, under the principles espoused in *Schmerber*, was correct (Opposition Brief: 15-18). All of respondent's arguments are unavailing.

1. Respondent concedes that this Court has "reserved the question of whether a strip search or visual body cavity search is permissible incident to a lawful arrest" (Opposition Brief: 6). Nonetheless, respondent asserts that because the "State won on that issue below," in that the New York Court of

Appeals permitted such warrantless searches, this case is not the "proper vehicle" to decide the matter (Opposition Brief 6). Respondent is wrong.

The investigatory search of respondent at the police precinct here was one continuous search that began when he was asked to remove his clothes and ended when the police pulled the string protruding from his rectum. Based upon these facts, the New York Court of Appeals determined that the police acted lawfully up until when they pulled the string. Respondent now attempts to artificially segment the strip and visual body cavity search from the subsequent pulling of the string. But this segmentation is flawed. As this was one continuous and uninterrupted search, this Court will necessarily have to determine whether the initial strip and visual body cavity search, which led to the discovery of the string, was lawful.

Put differently, this is not a situation where the resolution of this issue is irrelevant to the ultimate outcome of the case. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964) (*certiorari* denied because resolution of conflict would not have changed result reached below). Nor is this a situation where the petitioner is asking this Court to resolve an issue unessential to the judgment. *See, e.g., Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682 (2002) (*certiorari* dismissed because "petitioners were the prevailing parties below" who were seeking "review of uncongenial findings not essential to the judgment"). Rather, it is clear that to resolve the issue of whether the pulling of the string from

respondent's rectum was an unlawful intrusion into the body, as the New York Court of Appeals held, this Court must first address the issue of whether the steps that led up to the string pull were in themselves lawful.

In the alternative, respondent argues that *certiorari* on this issue should be denied because "there is no conflict among the lower courts for this Court to resolve" (Opposition Brief: 8). Respondent's contention is puzzling considering that both the majority and the concurrence of the New York Court of Appeals here acknowledged that a sharp split exists between jurisdictions that require a warrant for investigatory strip and visual body cavity searches incident to arrest -- the Ninth Circuit Court of Appeals and the State of Virginia -- and the majority of jurisdictions that do not (App. 7a, 18a-20a; Petition: 15-20). And indeed, in respondent's briefs to the New York Court of Appeals, where he argued that he had been subject to an unlawful warrantless visual body cavity search incident to his arrest, he relied on those very same Ninth Circuit and Virginia cases that he now claims form a "tiny opposing camp" (Opposition Brief: 8).[1]

Moreover, there is nothing to suggest that the cases from the Ninth Circuit and Virginia are not good law. In fact, recent decisions from a federal district court within the Ninth Circuit as well as a

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[1] See pages 33-35 of respondent's brief to the New York Court of Appeals, which can be provided upon request.

Virginia appellate court, both of which required a warrant for an investigatory visual body cavity search of an arrestee, demonstrate otherwise. *See Burton v. Spokane*, 2007 U.S. Dist. LEXIS 42101 (E. D. Wash. 2007) (*citing Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 [9th Cir. 1991]); *King v. Commonwealth*, 49 Va. App. 717 (Va. Ct. App. 2007); *see also* Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N. Dak. L. Rev. 67, 99-105 (2007) (acknowledging split between the Ninth Circuit and the rest of the Federal Circuits). Thus, there is absolutely no question that on the question specifically reserved by this Court in *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1982) (Petition: 12), the Circuits and States are split as to whether a warrant is required, and therefore, *certiorari* should be granted to resolve this important issue. *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (*certiorari* granted in securities fraud case because the "Ninth Circuit's views about loss causation differ from those of other circuits that have considered this issue).[2]

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[2] Of course, the need to resolve this split is especially pressing because, as explained on page 24 of the petition, there is a direct conflict between the state courts of Virginia and the Fourth Circuit Court of Appeals, which has jurisdiction over that state. *See, e.g., Johnson v. California*, 545 U.S. 162, 164 (2005) (*certiorari* granted where California state courts and Ninth Circuit Court of Appeals have provided "conflicting answers" to a *Batson* question, because "both of those courts regularly review the validity of convictions obtained in California criminal trials"). Likewise, while both jurisdictions do not require a search warrant, the Supreme Court of

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Lastly, with regard to the jurisdictions that permit warrantless strip and visual body cavity searches of arrestees to discover evidence, respondent argues that there is no discernable difference between those courts that follow the four-factor *Bell v. Wolfish* test and those that apply the "reasonable suspicion" standard (Opposition Brief: 9-11). Rather, respondent contends, both tests require a "particularized suspicion" that a suspect is secreting contraband before a strip or visual body cavity search is allowed (Opposition Brief: 10). Thus, respondent concludes, *certiorari* is not warranted because a "decision regarding the 'correct' standard would lack any practical significance" (Opposition Brief: 10).

The relevant case law, however, proves otherwise. For example, while the majority of jurisdictions that permit warrantless visual body cavity searches of arrestees have settled on the "reasonable suspicion" standard (Petition: 18), the Supreme Court of Massachusetts in *Thomas*, 429 Mass. at 408-09, held that under the *Bell* balancing test, probable cause that the arrestee was secreting contraband was required before the police could conduct a warrantless visual body cavity search

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Massachusetts requires that the police have probable cause to believe that an arrestee is secreting contraband, while the First Circuit Court of Appeals, which has jurisdiction over that state, requires only reasonable suspicion. *Compare Commonwealth v. Thomas*, 429 Mass. 403 (1999), *with United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007).

(Petition: 17-18). *See also Evans v. Stephens*, 407 F.3d 1272, 1279-80 (11th Cir. 2005) (while ruling that "reasonable suspicion" was the minimum level of suspicion required, opined that actual standard may be "higher").

At the other end of the spectrum, Texas' highest court for criminal appeals ruled that under the "justification" prong of *Bell*, the visual body cavity search of the suspect was justified based solely upon the initial probable cause that the suspect was "engaged in illegal activity." *McGee v. State*, 105 S.W.3d 609, 617 (Tex. Crim. App. 2003). No particularized suspicion, other than the probable cause to arrest, was required. *Id.* at 618 (Cochran, J. concurring). Thus, while respondent contends that it is irrelevant as to whether courts apply "reasonable suspicion" or whether they apply the four-factor *Bell* test, obviously, there is a significant, outcome determinative distinction between jurisdictions that require probable cause to believe that contraband has been secreted as opposed to those that require the lesser reasonable suspicion standard as opposed to those that permit such searches simply based on the probable cause of a suspect's arrest.

2. Turning to the second issue presented, whether the removal of a item partially protruding from a body cavity requires a warrant under *Schmerber v. California*, respondent primarily attempts to downplay the split that has roiled this nation's courts, claiming that the "State exaggerates the state of the law on this narrow issue" (Opposition Brief: 12-13).

However, while respondent maintains that this is a very "narrow" issue (Opposition Brief: 12), in actuality, any ruling that clarifies or expands upon *Schmerber* will necessarily impact other similar bodily "intrusions," such as x-rays and DNA tests, where the courts have also split as to whether *Schmerber* applies (Petition: 29-30). Thus, contrary to respondent's contentions, this case could potentially settle many currently unresolved areas of law.

Regardless, even on the allegedly "narrow" issue of whether the removal of an object protruding from a body cavity constitutes an intrusion into the body, as respondent notably concedes, this issue has split the intermediate-appellate courts of a number of states (Opposition Brief: 13). Some of those courts, like the New York Court of Appeals here, have determined that this type of search falls under *Schmerber*, and the police must first obtain a warrant; other courts have determined that *Schmerber* does not apply to this type of search (Petition: 31-32). In response to this split, respondent simply argues that no conflict yet exists because the "state high courts have not passed on the issue" (Opposition Brief: 13). However, until those state high courts rule, the intermediate appellate courts' decisions are the law of that state. Thus, whether or not a state's high court has yet ruled is immaterial as to whether a conflict exists.

But even more important than the split among the aforementioned intermediate-appellate courts, is the fact that two federal circuit courts of

appeals have decided this issue contrary to the New York Court of Appeals' ruling here (Petition: 31). To escape from under this split, respondent attempts to distinguish away the Ninth Circuit's decision in *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973), and the Fifth Circuit's decision in *State v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (Opposition Brief: 12). Respondent's distinctions are unpersuasive.

In *Holtz*, border guards suspected the defendant, who was attempting to enter the United States, of concealing narcotics in her vagina. 479 F.2d at 90-91. She was subjected to a strip search, at the end of which she was asked to bend over and spread her buttocks. *Id.* at 91. Upon her doing so, the guard saw a condom partially hanging from the her vagina; the guard removed the condom and discovered that it was filled with heroin. *Id.* In declining to suppress the evidence, respondent is correct that the court analyzed the strip search aspects of the case under the lowered expectation of privacy at the border (Opposition Brief: 12). Unlike in non-border circumstances, the court did not require that the suspect first be under arrest prior to conducting such a search. *Id.* at 92-94. However, with regard to removing the condom protruding from the defendant's body, the court applied traditional constitutional principles and held that there had been no "invasion and intrusion [as] regulated by ... *Schmerber*." *Id.* at 94. The Ninth Circuit distinguished *Schmerber* and its progeny from the search of the defendant by stating that *Schmerber*

involved an "intrusion into the body," which by implication, did not occur in *Holtz*. *Id.*

An almost identical border search took place in *Himmelwright*, where border guards removed a cocaine-filled condom partially protruding from the suspect's vagina. 551 F.2d at 992-93. Like the Ninth Circuit, the Fifth Circuit held that the lowered expectations of privacy at the border justified a strip search and visual body cavity search based solely upon reasonable suspicion that the suspect was concealing narcotics. *Id.* at 993-95. However, in distinguishing the search performed from a full body-cavity search, the court was careful to point out that the protruding contraband was "discovered in the course of an *exterior* search of the suspect's body." *Id.* at 996. Crucially, "there was no probing search" of the defendant's "orifices," and had the inspector "not seen a protruding object, any further search [into the body] may well have been constitutionally impermissible." *Id.* But, the court concluded, due to the visual nature of this search, "it was reasonable for the customs officers" to "remove the suspicious object from her body." *Id.*

Thus, like the Ninth Circuit in *Holtz*, the Fifth Circuit clearly differentiated, on constitutional grounds and not mere border security concerns, between searches that involved the physical entrance into the suspect's cavities, and those that involved the less-intrusive removal of an object protruding from those cavities. Because the decisions of these two federal circuit courts of appeals, along with the decisions from a number of

states, squarely conflict with the New York Court of Appeals' ruling here, *certiorari* should be granted. *See, e.g., Jones v. Flowers*, 126 S. Ct. 1708, 1713 (2006) (*certiorari* granted "to resolve a conflict among the Circuits and State Supreme Courts"); *Martinez v. Court of Appeal*, 528 U.S. 152, 155 (2000) (*certiorari* granted because petitioner has "raised a question on which both state and federal courts have expressed conflicting views").

Finally, respondent attempts to defend the decision of the New York Court of Appeals on the merits (Opposition Brief: 14-17). But in doing so, respondent does not even assert that by pulling the string protruding from his rectum, the police intruded into his body, which, under *Schmerber*, required a warrant (Opposition Brief: 14). Rather, respondent suggests that the application of *Schmerber* to the "removal of items protruding from body cavities" was correct because it was "consistent with *Schmerber*'s concern for 'human dignity and privacy,' and, importantly, protects an individual's safety under a wide range of factual possibilities" (Opposition Brief: 14). In essence, respondent contends that the broad principles of *Schmerber*, but not necessarily the factual circumstances, apply.

And given the facts here, respondent's failure to argue that the pulling of the string dangling away from his rectum constituted an intrusion into the body under *Schmerber*, is hardly surprising. Crucially, this implicit concession supports petitioner's argument that the "decision of the New York Court of Appeals directly conflicts with the rule

enunciated in *Schmerber*," which is that only police intrusions into the body require a warrant (Petition 33). For this reason alone, this Court should grant *certiorari*. *See, e.g., Bunkley v. Florida*, 538 U.S. 835, 836 (2003) (*certiorari* granted because "Florida Supreme Court contradicted the principles of this Court's decision in *Fiore v. White*); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974) (*certiorari* granted "to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court").

Regardless, even if this Court does not conclude that there is a direct conflict between this case here and *Schmerber*, this case undoubtedly presents a unique interpretation, and more importantly, a significant extension, of *Schmerber*. For this reason too, *certiorari* should be granted. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 432 (1981) (*certiorari* granted on the issue of whether reasoning of prior Court precedent also applies to different kind of sentencing procedure); *Oregon v. Mathiason*, 429 U.S. 492, 492 (1977) (*certiorari* granted because state court "has read *Miranda* too broadly").

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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